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No. 791

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In the

United States Court of Appeals

For the Seventh Circuit

No. 11985

SCOTT CUTHILL,
Plaintiff (Appellee),

vs.

ORTMAN-MILLER MACHINE COMPANY, a corporation,
Defendant (Appellee),

and

J. CARTER MLLER,
Intervenor (Appellant).

(Appeal from the United States District Court for the Northern District of Indiana, Hammond Division, Hon. Luther M. Swygert presiding)

INTERVENOR-APPELLANT MILLER'S APPENDIX

BENJAMIN S. WHAM
231 S. La Salle Street
Chicago, Illinois

OWEN W. CRUMPACKER,
THEODORE M. GEMBERLING,
Hammond, Indiana

Attorneys for
Intervenor-Appellant,
J. CARTER MILLER,

U. S. C. A. - 7
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IN THE UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Scott Cuthill,
Plaintiff (Appellee),

vs.

Ortman-Miller Machine Company,
a Corporation,
Defendant (Appellee),
and
J. Carter Miller,
Intervenor (Appellant).

No. 11985

(Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division
Hon. Luther M. Swygert, Presiding)

SUMMARY STATEMENT UNDER RULE 16(b).

Attorneys for Intervenor-Appellant:

Benjamin S. Wham
231 S. LaSalle Street
Chicago, Illinois

Owen W. Crumpacker
Theodore M. Gemberling
5217 Hohman Avenue
Hammond, Indiana

Attorney for Plaintiff-Appellee:

Lee M. Burkey, Jr.
130 N. Wells Street
Chicago, Illinois

Attorneys for Defendant-Appellee:

James J. Richards
5305 Hohman Avenue
Hammond, Indiana

James V. Donadio
9th Floor—Consolidated Bldg.
Indianapolis, Indiana

Plaintiff-appellee Scott Cuthill commenced the suit by filing a complaint against defendant-appellee Ortman-
2 Miller Machine Company, a corporation, on June 2nd, 1953. Defendant-appellee Ortman-Miller Machine Company filed answer on June 23rd, 1953. The cause was submitted on the complaint and answer, brief testimony of the plaintiff, and counsel's statements on December 21st, 1953, and an agreed judgment signed on that date in favor of plaintiff-appellee Scott Cuthill in the sum of $4,100.00. A satisfaction of judgment, signed by plaintiff-appellee Scott Cuthill, was filed with the Clerk simultaneously on December 21st, 1953, and the proceeds of the judgment paid into the office of the Clerk. The following day, December 22nd, 1953, plaintiff-intervenor, J.

Carter Miller, filed his "Petition for Leave to Intervene, Vacate Consent Judgment and Defend on Behalf of the Defendant Corporation." On January 6th, 1954, plaintiff-appellee Scott Cuthill filed his "Motion to Strike and Dismiss" the petition of J. Carter Miller. The motion to strike and dismiss was submitted to the court and sustained on January 28th, 1954. Thereupon, and on January 30th, 1954, intervenor-appellant filed his "Amended Petition for Leave to Intervene, Vacate Consent Judgment and Defend on Behalf of the Defendant Corporation." Plaintiff-appellee Scott Cuthill, on February 10th, 1954, filed his second "Motion to Strike and Dismiss" the amended petition. This motion to strike and dismiss was submitted and on April 15th, 1954, the District Court (Hon. Luther M. Swygert) sustained plaintiff-appellee's motion to strike and dismiss the amended petition.

Intervenor Miller appealed to this Honorable Court from the order of April 15th, 1954, and a reversal was entered on October 14th, 1954, with an opinion by Judge Lindley. *Cuthill* v. *Ortman-Miller Machine Company and J. Carter Miller, Intervenor,* Cause No. 11184, (1954) 216 F. 2d 336.

On remand, plaintiff Cuthill filed a reply in admission and denial to the Amended Petition for Leave to Intervene and, subsequently, filed a Reply of Res Adjudicata.

3 Defendant Ortman-Miller Machine Company filed an Answer Claiming Res Adjudicata. With the Reply and Answer of Res Adjudicata, the plaintiff and defendant tendered an opinion of the Appellate Court of Indiana under date of February 14th, 1955, in an appeal entitled *J. Carter Miller, etc.* v. *Alva Ortman, et al.* (1955) 124 N.E. 2d 390; 125 N.E. 2d 257. On the issues formed by the amended petition for leave to intervene and the responsive pleadings hereinbefore described, the cause

was submitted to the District Court for determination without the intervention of a jury on February 28th, 1955, and evidence heard for one week at which time the cause was taken under advisement.

Intervenor Miller's Amended Petition was denied on August 29th, 1955 with a written opinion. Within 10 days Intervenor Miller filed a Motion for a New Trial and a Motion for Amendment of Opinion to Include Omitted Findings. Submission of the motions was withheld pending the determination of a petition to transfer the case of *J. Carter Miller* v. *Alva Ortman, et al.* (1955) 124 N.E. 2d 390, supra, by the Supreme Court of Indiana. The Supreme Court of Indiana granted transfer, vacated the Appellate Court opinion, and reversed the trial court in a written opinion handed down on July 12, 1956. *Miller* v. *Ortman, et al.* (1956) 136 N.E. 2d 17. Notwithstanding the favorable decision of the Supreme Court of Indiana vacating the opinion relied on by the plaintiff, defendant, and the District Court in its opinion of August 29th, 1955, the motions were denied on November 30th, 1956.

Notice of appeal and bond were filed on December 30th, 1956. A supersedeas order was obtained staying disbursement of the $4100 in the Clerk's hands pending a determination of the appeal. The time for the filing of the record was extended by the District Court to and including March 2nd, 1956. The record was filed within the time allowed.

4 ORDERS APPEALED FROM.

Order Denying Intervention.

In accordance with the findings of fact and conclusions of law with opinion heretofore entered, the amended petition of the intervenor to vacate the consent judgment and defend on behalf of the corporation is denied.

Order Overuling Motions For New Trial, etc.

ORDER.

Motion for Amendment of Opinion to Include Omitted Findings and Motion for a New Trial of intervenor J. Carter Miller is denied.

Enter:

Luther M. Swygert
Judge

Hammond, Indiana
November 30, 1956.

5 THE UNITED STATES DISTRICT COURT
Northern District of Indiana
Hammond Division

Scott Cuthill,
Plaintiff

vs.

Ortman-Miller Machine Company,
a corporation,
Defendant
and
J. Carter Miller,
Intervenor

No. 1479 Civil

(Filed Aug. 29, 1955)

OPINION.

The defendant, Ortman-Miller Machine Company, was incorporated as an Indiana Corporation in 1945. The incorporators were J. Carter Miller, Carl Speichert, and Alva Ortman. At the time of the hearing on the intervenor Miller's petition to set aside the consent judgment and defend on behalf of Ortman-Miller, Miller owned 20% of the corporation's stock and 20% was also held by each of four other shareholders, Alva Ortman, Nelson Ortman, Harold Ortman and Carl Speichert. Miller was president of Ortman-Miller from the time of its incorporation until March of 1952. Ortman-Miller is a machine shop, making and selling machine metal parts, and particularly a hydraulic cylinder.